SHER TREMONTE LLP

September 9, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write on behalf of our client, Gary Hirst, in response to the government's motion to preclude, filed on September 9, 2016. The government argues that Mr. Hirst should be precluded from offering evidence of [redacted] through the FBI agent who will testify regarding a recording of a consensually monitored phone call between Mr. Hirst and Mr. Galanis in which "the Shahini thing" is briefly mentioned. The government's motion should be denied.

Mr. Hirst has no intention to offer evidence of [redacted]. Instead, as explained before Your Honor in the final pretrial conference and in numerous communications with the government, Mr. Hirst simply seeks to elicit: (1) the period of time in which Mr. Galanis's phone was monitored; (2) the number of calls that were recorded; and (3) the number of those calls that were with Mr. Hirst. Based on this evidence, Mr. Hirst is entitled to argue that the absence of incriminating evidence in the other recorded calls between himself and Mr. Galanis undermines the government's theory that the two plotted an elaborate conspiracy to place shares in the hands of Shahini for Mr. Galanis's benefit and then pump and dump the stock. *See United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) ("The absence of evidence in a criminal case is a valid basis for reasonable doubt."). Simply put, the jury should know that there are many additional recorded calls that were recorded during an extended period of time, none of which reference Shahini.

Mr. Hirst is also entitled to introduce the other calls in order to show context for the call that the government seeks to introduce. *See United States v. Dominguez*, 280 F. App'x 81, 84 (2d Cir. 2008) (holding that there is no hearsay bar to admitting statements "to provide context" for defendant's statement); *United States v. Cimino*, 14 Cr. 103(CM), 2014 WL 5473234, at *1 (S.D.N.Y. Oct. 29, 2014) (statement admissible for purpose of placing defendant's statement in context). As we explained, it is far from clear what Mr. Hirst meant when he mentioned the "Shahini thing," and whether the

80 Broad Street, Suite 1301 | New York, New York 10004
www.shertremonte.com | Tel: 212-202-2600 | Fax: 212-202-4156

reference to "everyone missing it" on an unfiled (indeed, never-filed) draft registration statement is nefarious or innocent. Certainly, the fact that there are two hundred other recorded calls with Mr. Hirst (among a total of thousands of calls) without reference to Shahini makes it less likely that Mr. Hirst's statements should be interpreted as evidence of criminal intent, and the jury is entitled to know that fact.

Importantly, the absence of any statement about "the Shahini thing" on the other calls is not itself a statement, and thus there is no hearsay bar to admitting the other calls to establish the lack of incriminating evidence. *See Fathera v. Smyrna Police Dep't*, 646 F. App'x 395 (6th Cir. 2016) (absence of police report was not an assertion and, as such, was admissible as "non-hearsay evidence"); *Columbia Commc'ns Corp. v. EchoStar Satellite Corp.*, 2 F. App'x 360, 370 (4th Cir. 2001) (absence of complaints did not constitute statements and therefore not hearsay because "silence was not intended to communicate anything at all"); *Hendon v. Calderon*, No. 1:08-cv-00139, 2009 WL 1424388, at *3 (E.D. Cal. May 20, 2009) ("Declarants' statements regarding the contents of Plaintiff's grievance record is not hearsay when used to demonstrate the non-existence of a grievance or appeal . . . ."); *Howe v. Hull*, 873 F. Supp. 70, 71–72 (N.D. Ohio 1994) (statement that "[a]t no point did [a witness] ever mention [a particular fact]" was not hearsay, because "the failure to say something is simply not a statement for purposes of Rule 801"); *Multnomah Cty. Corr. Officers Ass'n v. Multnomah Cty.*, No. 87-cv-932 (FR), 1988 WL 107053, at *6 (D. Or. Oct. 14, 1988) ("Testimony as to the absence of a statement is not hearsay.").

Of course, to play hundreds of hours of phone calls to the jury to establish that there is no further discussion about "the Shahini thing" between Mr. Hirst and Mr. Galanis would be a grossly inefficient use of the Court's and the jury's time. It is also easily avoidable. Accordingly, Mr. Hirst has asked the government to stipulate to the above facts, *i.e.*, that Mr. Galanis's calls were recorded for over a year, the number of calls that were recorded, and the number of those calls that were with Mr. Hirst.[1] Mr. Hirst has no need and no intention to elicit any further evidence regarding [redacted] to explain those facts.

[1] The government has refused to so stipulate.

Accordingly, the government's motion to preclude such evidence should be denied and Mr. Hirst should be permitted to present evidence of the context of the Shahini call, either through the government's FBI witness or, if the government will consent, by stipulation.

Respectfully submitted,

/s/

Michael Tremonte
Justine A. Harris
Noam Biale
SHER TREMONTE LLP
80 Broad Street, 13th Floor
New York, NY 10004
Tel: (212) 202-2600
Fax: (212) 202-4156
Email: mtremonte@shertremonte.com

cc: AUSA Brian Blais (via ECF)
AUSA Rebecca Mermelstein (via ECF)
AUSA Aimee Hector (via ECF)